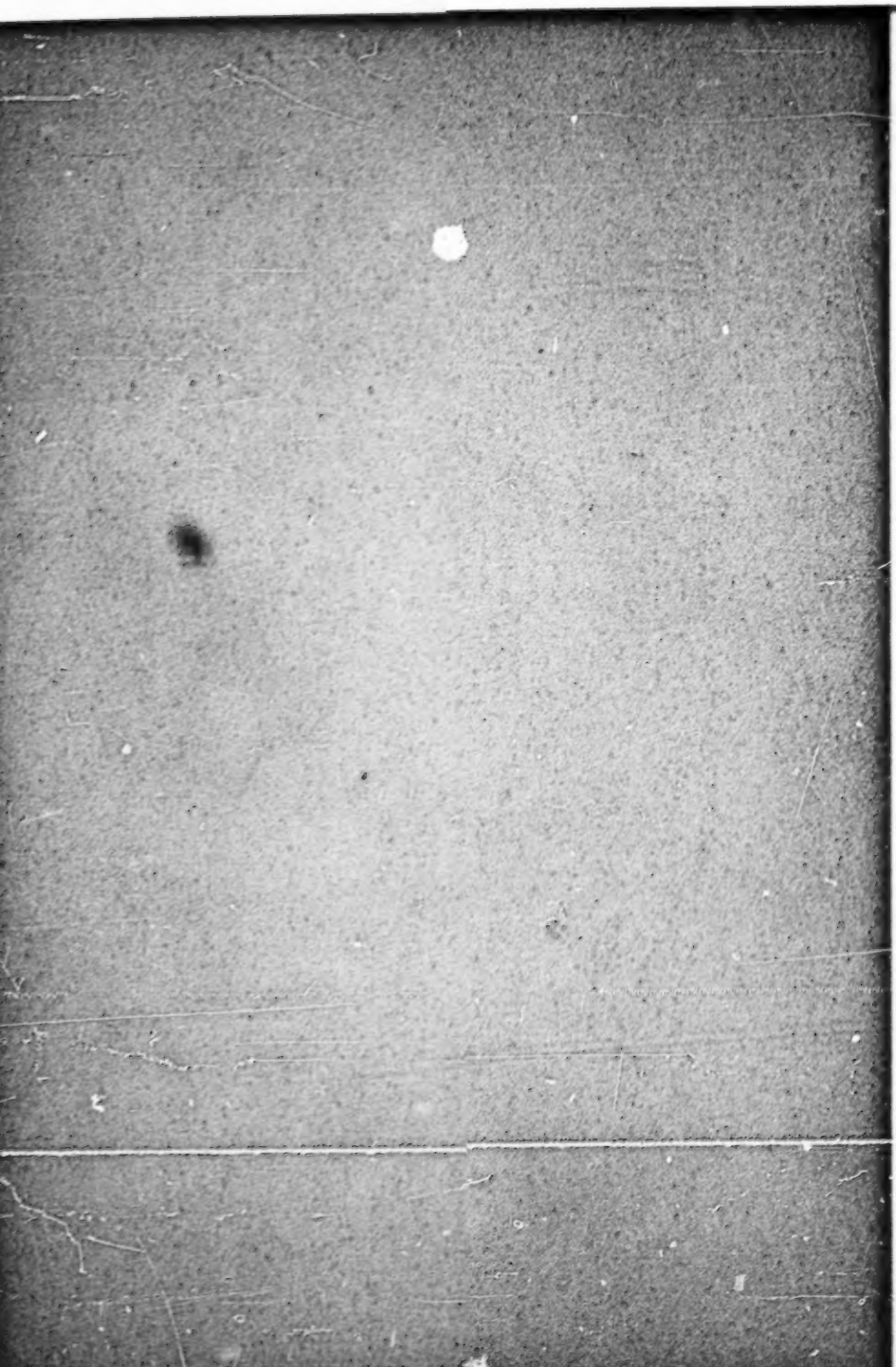

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Nos. 74-5 and 74-12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

EDWARD C. REA and 22 FORD, INC., a corporation,
Petitioners,

v.

FORD MOTOR COMPANY, a corporation,
Respondent.

EDWARD C. REA and 22 FORD, INC., a corporation,
Petitioners,

v.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit, and Motion for Leave to File Petition for Writ of Mandamus

---

BRIEF OF RESPONDENT FORD MOTOR COMPANY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI AND MOTION FOR LEAVE TO FILE

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August, 1974

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that the record in the trial court was so devoid of evidence of any injury to petitioners from operation of company-owned outlets as to warrant judgment for respondent on the cause of action based on such operation.

2. Whether the court of appeals correctly determined on the basis of the record that the damages awarded under the Automobile Dealers Act were in part duplicative and therefore required recomputation.

STATEMENT

Proceedings Below

This is a private treble damage antitrust action claiming violations of the Sherman Act (15 U.S.C. §§ 1 and 2) brought against respondent Ford Motor Company. The complaint, filed by a Ford automobile dealership and its proprietor, the petitioners here, included various other contentions under federal and state law, particularly a claim under the Automobile Dealers Act (15 U.S.C. § 1221, *et seq.*).[1]

Petitioners' Sherman Act contentions were, first, that Ford had unlawfully operated company-owned dealerships; and, second, that Ford had illegally agreed on the prices at which Ford dealers were to sell to national car rental companies. The gist of the first claim, concerning the operation of company-owned dealerships, was that from time to time such outlets lost money.

The jury found that Ford had violated the Sherman Act, but its verdict did not reveal whether that ruling was directed at both of petitioners' claims or only the

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[1] The Petition for Writ of Mandamus appended to the Motion for Leave to File in large part duplicates the Petition for a Writ of Certiorari. Hence, observations as to one Petition are applicable to the other. The special issue raised by this attempt to seek Mandamus is treated at pp. 25-26, *infra*. Hereafter, page references to the "Petition" are to the Certiorari Petition. Citations to the appendix to the Petition are in the form "Pet. App. —"; to the joint appendix submitted in the court below, "3d Cir. App. —"; and to the trial transcript, "Tr. —."

first. Damages, before trebling, were set at $1,750,000. The jury also found that Ford had violated the Automobile Dealers Act and that petitioners were entitled to damages in the amount of $350,000.

The district court denied Ford's motion for a judgment *n.o.v.* or, in the alternative, for a new trial, but required petitioners to file a remittitur which reduced Sherman Act damages, before trebling, to $1,000,000.

Upon appeal by Ford, the court of appeals for the third circuit entered a judgment in Ford's favor on one claim—that of Sherman Act liability by reason of Ford's method of operation of its company-owned retail outlets; remanded for a new trial with respect to the Sherman Act price-fixing claim because of the uncertainty of what the jury had decided; upheld the determination that Ford had violated the Automobile Dealers Act; and ordered a new trial on the question of Dealers Act damages because of the presence of duplicative recovery.

Both petitioners and respondent requested a rehearing, but those requests were denied on May 28, 1974.

The Petition for Certiorari is concerned with the court's ruling on the first Sherman Act claim, which was that petitioners had failed to show any injury to their business or property,[2] and with the court's deter-

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[2] Because it determined petitioners failed to make the threshold showing of injury as to the company store claim, the court of appeals did not reach Ford's contentions that Section 1 of the Sherman Act had not been violated, that instructions were erroneous, and that no legally adequate basis for computing damages had been provided. The court of appeals did state that no Section 2 claim was established. (Pet. App. 121, n.28) The Petition does not question this ruling and, accordingly, we do not treat it.

The Petition does not raise any issues respecting the price-fixing claim, and we do not hereafter discuss it. We note, however, that

mination that a retrial was needed as to the question of damages under the Automobile Dealers Act. We describe these issues in more detail.

Sherman Act Claim

Petitioners operate a profitable Ford dealership in a suburb of Pittsburgh, Pennsylvania. Their franchise was granted by Ford in 1964, at a time when, according to petitioners' allegations, Ford was supposedly in the midst of a predatory program to destroy all its franchised dealers and replace them with wholly-owned outlets. Except for sales to the United States Government, Ford does not sell directly to ultimate customers; rather, it sells to franchised retail dealers who resell to the public. Ford relies almost exclusively on independently owned retail outlets for distribution of its cars. The record showed without contradiction that at the time of trial approximately 97% of all Ford outlets were independently owned and financed (like petitioners' outlet), and that only a small percentage of the remaining 3% were wholly-owned subsidiaries of Ford. (Pet. App. 99-100) [3]

Petitioners' claim was that Ford was intentionally pursuing a plan to drive its 6000 independently-owned Ford dealers out of business through operation of com-

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the Petition errs in stating (p. 5) that the court of appeals held that petitioners had proved a price-fixing violation. All the court concluded was that the jury *might* properly have inferred from the evidence that an unlawful agreement existed. But whether the jury did or did not is unknown. The court did not hold that such an inference was compelled.

[3] "The remainder were 'dealer development' outlets in which Ford and private parties share the investment, and which are established in the expectation that the private participant will acquire full ownership of the outlet out of his share of its profits." (Pet. App. 99-100)

pany stores at a loss. Petitioners asserted that this plan was nationwide in scope, but their evidence focused primarily on Ford's operation of Triangle Motors, a company-owned Ford dealership in downtown Pittsburgh.

Triangle became a Ford subsidiary in 1961 after its independent operator fell into financial difficulty. (Pet. App. 116) The record is uncontradicted that Ford never created a company-owned outlet and that in every case where company ownership occurred, it was because the independent dealer was in financial distress or had died (3d Cir. App. 1085a-90a, Tr. 3468); and that during the past ten years Ford never had more than 36 company-owned outlets throughout the country at one time, and but thirteen at time of trial. (3d Cir. App. 1097a, 1136a, Pet. App. 99) Consistent with its policy of transferring company-owned stores back to private ownership as promptly as possible (3d Cir. App. 753a, 759a, 1096a-99a), Ford made several efforts to transfer Triangle back to an independent dealer (*e.g.*, 3d Cir. App. 1167a, Tr. 3999, DX 35, 2054a, Tr. 3375) and was ultimately successful.[4]

The Triangle dealership was profitable in four of the eight years following Ford ownership in 1961, but incurred losses, sometimes substantial, in the other years until its closing in May 1969. (Pet. App. 116) Triangle was the only company-owned outlet selling

[4] Triangle was replaced in 1969 by a dealer development store (see note 3), which operated until closed by a lengthy strike in 1970. The Petition (p. 21) surprisingly relies on the $300,000 lost by Triangle's successor, even though the record establishes that a substantial part of those losses were incurred while the dealership was closed by a strike and later during the company's liquidation. (3d Cir. App. 668a-69a, 692a) Losses during periods of non-operation obviously could not adversely affect petitioners.

Ford automobiles in the Pittsburgh area during the relevant period, except for a period of several months when there was one other company store. (Pet. App. 116)[5]

Petitioners presented evidence attempting to show that Ford operated its Triangle outlet purposely at a loss, primarily by causing it to engage in excessive advertising and other sales-promotion activities. A witness testified as to statements claimed to have been made in his presence by various Ford executives which in petitioners' view show that Ford was prompted by an intent to drive independent Ford dealers out of business and to monopolize the retail distribution of Ford cars. (Remarkably enough, one of these supposed statements of destructive intent is said to have been made in a speech by a Ford executive to a meeting of over 1500 independent Ford dealers—his alleged victims. (3d Cir. App. 543a-44a, 574a-75a)) Read plainly, the alleged statements reflect only Ford's desire to compete energetically with other auto manufacturers, using company outlets if needed for adequate distribution coverage. (See Pet. App. 117, n.24)

Petitioners also placed great emphasis on the fact that Ford, as the owner of Triangle, covered the subsidiary's losses with capital contributions and loans and claimed income tax deductions for the losses.[6] And

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[5] Petitioners misleadingly refer to two other "Ford owned . . . outlets" (p. 21) which in fact were company-owned only during brief liquidation periods. (3d Cir. App. 669a-71a, 715a)

[6] While not attempting to note every misstatement in petitioners' brief, we are compelled to challenge their discussion of these loans and capital contributions (p. 20). The total of Ford's capital contributions and loans to Triangle over the years was $1,000,000, but portions of this money were regularly being

petitioners relied heavily on the opinion testimony of an assistant professor of marketing, who concluded on the basis of a theoretical model that it would, under certain circumstances, be to Ford's economic advantage to operate company outlets at a loss when it could thereby divert sales from its competitors such as General Motors and Chrysler. This witness postulated that while such a policy, if pursued, would increase Ford's profits only by diverting sales from competing manufacturers, it would also divert some sales from independent Ford dealers. He did not, however, offer any evidence that the operations of Triangle or other Ford company-owned stores had in fact diverted any sales from independent Ford dealers, or from the petitioners. On the contrary, he admitted he had never studied petitioners' outlet or examined its financial records and expressly took the position that the effect on petitioners' outlet was not relevant to his testimony. See pp. 10-11, 19-20, below.

Petitioners offered no evidence that Triangle or any other company-owned Ford dealership engaged in predatory price-cutting or any similar practices. In fact, the evidence showed that Triangle's prices were in no way abnormal and that Triangle had charged an average of $50 more per car than did petitioners' outlet. (Pet. App. 119) There was no evidence that

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repaid to the parent company. (Pet. App. 116, 3d Cir. App. 548a-53a) At no time did Triangle have outstanding loans to Ford in excess of $300,000, and its capital account never exceeded $317,800. (3d Cir. App. 553a) These figures indicate the inaccuracy of petitioners' statement that "Ford knew [the capital investments] would never be repaid" (p. 20). They indeed were largely repaid. Moreover, in suggesting that large total operating losses were incurred, petitioners aggregate all losses over a seven-year period but ignore the extent to which profitable years served to reduce that aggregate.

the advertising of the company stores was excessive in comparison with that of their immediate competitors (e.g., nearby General Motors and Chrysler dealers). In fact, petitioners' own evidence showed that Triangle's downtown competitors advertised more heavily than did it. (PX 131H, 3d Cir. App. 1837a, Tr. 3200) [7] And data provided by Ford showed that Triangle's advertising was similar to certain area Ford dealers of comparable size. (3d Cir. App. 1316a-20a, 1391a-93a, DX 210, 2079a, Tr. 4308) Petitioners presented no evidence that the advertising of the company stores was designed to lure prospective buyers away from independent Ford outlets; on the contrary, the evidence showed that the company stores were forbidden to advertise themselves as "factory outlets." (3d Cir. App. 1102a, DX 44, DX 193, 2064a, 2073a, Tr. 1775, 3394) Petitioners did not claim, nor could they, that Ford had engaged in coercive refusals to deal, or priced its cars disadvantageously to petitioners, or otherwise restrained independent dealers.[8]

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[7] That evidence was confirmed by data presented by Ford, showing that Triangle's advertising expenditures were less than or comparable to those of Chevrolet, American Motors, and Dodge dealers in the immediate area. (3d Cir. App. 1392a-94a)

[8] We do not attempt here to review in detail Ford's rebuttal evidence on the company-store substantive claim. The thrust of Ford's evidence was that company stores were employed only temporarily and occasionally where an independent Ford dealer fell into financial difficulty, that Ford attempted to turn such stores back to private hands, that company stores were operated in a manner indistinguishable from independent franchised stores, that this policy was applied to Triangle Motors, and that Triangle's occasional losses were due to its poor physical plant, unwise staffing from time to time, decline in the economy of Pittsburgh's inner city, and related factors. Petitioners' "intent" evidence was likewise refuted.

No effort was made by petitioners to show that company-owned stores were making inroads on sales by independent Ford dealers in the relevant geographic market; indeed, the evidence was uncontroverted that Triangle's share of the market remained throughout at a modest 3% to 4%. (DX 204, 3d Cir. App. 2075a, Tr. 4306)

Petitioner Rea admitted during direct examination that he did not know personally of any instance in which a person who had been solicited by his outlet had bought instead from Triangle. (3d Cir. App. 206a-07a) He suggested that such information might lie within the knowledge of sales personnel of his outlet or be disclosed by its records (3d Cir. App. 204a, 206a), but no sales personnel or other employees of the outlet were ever called to testify on this point and the records referred to by the witness were never produced or offered in evidence.

Petitioners did not introduce their financial records into evidence; did not attempt to prove that they had lost any profits or sales or had incurred increased operating costs by reason of any acts of Ford; presented no evidence that their market share had suffered by reason of competition from Ford; and made no effort to demonstrate injury or damages by comparative or statistical methods. The two witnesses presented by petitioners who were presumably in the best position to observe any injury to petitioners' outlet—its president and general manager—had not a word to say about that subject.[9]

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[9] Hence Ford was prevented from cross-examining petitioner Rea, the president of the outlet, on the issue of damages, on the ground that none of his direct testimony dealt with that subject. (Tr. 493-94)

In an effort to satisfy the statutory prerequisite of proving injury to their business and property (15 U.S.C. § 15), petitioners relied on the testimony of their expert witness, the assistant professor of marketing. He asserted that the operating losses incurred from time to time by Ford's wholly-owned outlets, such as Triangle, should be regarded as a "subsidy" paid by Ford to its subsidiaries. The witness, who was not a lawyer, then appeared to assume that the law required that every independent Ford dealer, such as petitioners, be entitled to a like "subsidy" from Ford. (*E.g.*, 3d Cir. App. 877a, 986a) Hence, according to the witness, the failure of Ford to grant to petitioners a sum of money corresponding to losses suffered by Ford's company-owned outlets, *ipso facto* constituted the "injury" to petitioners. And the amount of that injury, the witness argued, should be calculated by computing on a per-car basis a composite "subsidy" figure for Triangle and certain other company outlets, and by multiplying that figure by the number of cars sold by petitioners.

Thus according to this witness' concept of injury and damages, petitioners' "injury" and consequent recovery would increase for every car they succeeded in selling. Had petitioners been twice as successful as they were, instead of $3,000,000 in treble damages they would have been entitled to $6,000,000. (See 3d Cir. App. 986a-87a) And, since no particular impact on petitioners had been shown, this concept of "injury" would presumably be available to support like claims by all other independent dealers.

The testimony of petitioners' expert revealed nothing about the operations of their outlet except the number of cars sold annually—a figure used as a mul-

tiplier in computing "damages." The witness readily admitted that he had never examined the financial records of petitioners' outlet (*e.g.*, 3d Cir. App. 906a), and in his view the operations of that outlet were not "relevant" to his testimony (3d Cir. App. 876a, 906a); he asserted that the operation of petitioners' outlet "has nothing to do with what I am developing" (3d Cir. App. 969a), and that for purposes of his testimony "[w]e don't care what 22 Ford did." (3d Cir. App. 986a)

This view was echoed in a candid admission by petitioners' counsel made during trial, and quoted by the court of appeals:

> "What our position is in the case is what [petitioner] 22 Ford did or did not do is not relevant because we are not asserting in our case that 22 Ford sustained a loss of profits . . . . [W]e haven't put any evidence in the record to indicate any particular loss sustained by 22 Ford." (Pet. App. 120)

In sum, on the basis of a showing that Ford owned a small number of retail outlets, and that some of these outlets, including Triangle, sometimes showed a loss at the end of the year, petitioners asserted an absolute obligation to make payments per car to independent dealers, and sought to transform the absence of such payments into an automatic "injury" for which treble damages were due.

Ford presented considerable evidence to demonstrate that petitioners' dealership was not in fact injured. A detailed market analysis demonstrated that petitioners' outlet and Triangle serviced generally different market areas with a limited number of overlapping

potential customers.[10] And as to those customers, petitioners were as successful as Triangle in obtaining them. Moreover, the "evidence demonstrated that 22 Ford's percentage of sales in [Triangle's marketing] area did not increase after Triangle and its successor went out of business" (Pet. App. 119); the real beneficiaries of the shut-down were Triangle's Chevrolet competitors. Based on this and other evidence, the experts called by Ford concluded that "the operation of Triangle . . . and [its] subsequent closing had no effect at all on the operation of 22 Ford." (3d Cir. App. 1368a) Petitioners presented no contrary evidence. They maintained to the end that whether their outlet had in fact suffered economic injury was not "relevant" to this case.

Despite the absence from the record of any evidence of injury, the jury found in favor of petitioners and fixed damages at $1,750,000. This finding and "damage" computation was necessarily based upon petitioners' "subsidy" theory; no other basis for an award of damages had been presented. And the district court's one million dollar "damage" award on remittitur was expressly computed on the basis of a "subsidy" theory. (Pet. App. 80-84) The district court did not purport to find in the record any evidence that 22 Ford had been actually injured to any extent,[11] let alone to the extent of one million dollars.

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[10] Triangle, in downtown Pittsburgh, and petitioners' 22 Ford, in suburban Monroeville, were 9.2 miles apart, with two other Ford dealers located between them. (3d Cir. App. 1289a)

[11] In denying Ford's post-trial motions, the district court sought to remedy this gap in the record by observing that it was reasonable to expect that some customers might be diverted from one Ford dealer to another in the Allegheny County area. (Pet. App.

On appeal by Ford, the court of appeals determined that the record in the case "provides no rational support for a determination, even by way of inference, that Ford's operation of its company stores caused any injury to the business or property of 22 Ford." (Pet. App. 119) Section 4 of the Clayton Act (15 U.S.C. § 15) authorizes suits only by a person "injured in his business or property." Hence the district court was ordered to enter a judgment for Ford on that part of the Sherman Act claim based upon Ford's operation of its wholly-owned retail outlets.

Automobile Dealers Act Claim

Petitioners obtained from the district court an award of $350,000 under the Automobile Dealers Act. In essence, the claim under that Act as it went to the jury was that Ford had in 1964 illegally coerced petitioners into resigning a General Motors franchise in a neighboring town shortly after petitioners were awarded their Ford franchise. They sought damages computed, among other ways, on the basis of a straight-line projection of the future estimated profits of the General Motors franchise from the time of its termination to the time of trial. The jury's award of $350,000 was, as observed by the court of appeals, based on that damage theory. (Pet. App. 114)

While upholding the "close case" on liability (Pet. App. 106), the appellate court ruled that the damages awarded under the Dealers Act were excessive and duplicative. When petitioners resigned their General

79) As stated by the court of appeals, such an observation was "entirely speculative and cannot support the necessary finding that 22 Ford sustained an injury to its business or property as required by Congress for recovery under § 4 of the Clayton Act." (Pet. App. 120)

Motors franchise, they received $60,000 in a sale of certain assets used in that franchise, and that capital was then devoted to operation of the Ford franchise, as were other assets, of an unknown value, which were simply transferred from the old General Motors franchise to the new Ford franchise. Petitioner Rea himself thereafter devoted his time to the Ford rather than the General Motors dealership. But neither the trial court's instructions nor petitioners' damage testimony had taken into account the necessity of adjusting the claimed damages to reflect the fact that the new Ford franchise had been operated with precisely the same capital and assets previously employed in the terminated General Motors franchise. The court of appeals therefore ruled that petitioners were not entitled to an unadjusted recovery, and the issue of damages was remanded for redetermination in light of the court's opinion. (Pet. App. 114-15)

ARGUMENT

The decision of the court of appeals, which reflects an exhaustive examination of the record in this case, is correct. It applies well established legal principles and is not in conflict with any decision of this Court or any other court. The case presents no constitutional issues. There are no special or important reasons that warrant further review.

I. No Principle Regarding Appellate Powers Nor Constitutional Issue Regarding the Right To Trial by Jury Is Presented by This Case

Petitioners seek to seize the attention of this Court by suggesting a constitutional issue where none exists. Petitioners claim that the court of appeals exceeded the proper scope of appellate review and violated peti-

tioners' right to a jury trial under the Seventh Amendment.

However, it is clear that the Seventh Amendment does not present an absolute bar to an appellate court's reversal of a jury finding. Numerous decisions of this Court and the lower federal courts confirm that a court of appeals may overturn a jury finding and direct a verdict for the defendant where the plaintiff failed to present sufficient evidence from which the jury could properly have found a critical element in the plaintiff's cause of action.

The court of appeals regarded this as precisely such a case. The Clayton Act authorizes private treble damage suits only by those who have been injured. 15 U.S.C. § 15. The court stated:

> "The record here provides no rational support for a determination, even by way of inference, that Ford's operation of its company stores caused any injury to the business or property of 22 Ford." (Pet. App. 119)

It carefully noted that where a violation of the antitrust laws did cause injury to the business of a competitor of automobile manufacturers "they will be liable for damages." (Pet. App. 121) But after an extensive review of the record in this case and the very arguments petitioners here set forth as indicating the "plethora" of facts indicating injury, the court of appeals concluded that petitioners had failed to present adequate evidence that Ford's operation of its company-owned outlets caused them any economic injury.

The court of appeals did not undertake to weigh conflicting evidence and to draw inferences contrary to adequately based jury findings. Hence the petitioners' extensive citations to cases under the Federal Employ-

ers' Liability Act and the Jones Act (pp. 9-14) are inapposite. There the fact of injury was evident and the controversy was over the extent to which plausible jury findings on causation or neglect or employee status were displaced by a court's own preferred view of the facts. Here, by contrast, the court dealt with a case where petitioners consciously refused to present any evidence of actual injury, and the court, accordingly, ruled that the district court erred in allowing the case to go to the jury.

Where the evidence on a critical issue is insufficient to go to the jury and thus where, as was the case here, the district court erred in denying motions for a directed verdict or for judgment notwithstanding the verdict, it is well established that the Seventh Amendment is no bar to a reversal on appeal. In *Neely* v. *Eby Construction Co.*, 386 U.S. 317 (1967), this Court held that the Seventh Amendment's right to jury trial provides no greater obstacle to the power of an appellate court to enter a judgment n.o.v. than it does to a trial court and "consequently, there is no constitutional bar to an appellate court granting judgment *n.o.v.*" 386 U.S. at 322. This Court went on to state: "Likewise, the statutory grant of appellate jurisdiction to the courts of appeals is certainly broad enough to include the power to direct entry of judgment *n.o.v.* on appeal." *Id.* *See also United States* v. *Generes*, 405 U.S. 93, 106 (1972); *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, 254 (1940); *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U.S. 654 (1935); 5 *Moore's Federal Practice* ¶ 38.05[5], at 89-90.[12] In short, if the

[12] Similarly, in Galloway v. United States, 319 U.S. 372, 396 (1943), the Court held that the Seventh Amendment does not bar a directed verdict against a plaintiff who withheld critical evidence in his possession that bore on an essential element of his case.

district court erred in its determination that sufficient evidence existed for the case to go to the jury, that is an error of law correctable by the court of appeals.

In essence, therefore, the Petition presents only the question whether the court of appeals erred in its determination that the record in this case presented no adequate evidence on an essential element of petitioners' case.

II. The Court of Appeals Correctly Determined That the Record Below Was Devoid of Evidence of Injury

The court of appeals correctly stated the governing principle of law (Pet. App. 118):

> "It is well established that a person seeking to recover treble damages under Section 4 of the Clayton Act, 15 U.S.C. § 15, cannot prevail merely by proof that the defendant has violated the antitrust laws. In addition, he must prove that the violation was a material cause of some injury to his business or property."

See also Hawaii v. *Standard Oil Co.*, 405 U.S. 251, 260-64 (1972), and the decisions from other courts of appeals cited by the third circuit below (Pet. App. 118-19).[13] This prerequisite to a plaintiff's right to treble damages serves to deter uninjured parties from clogging the courts with vexatious, windfall litigation.

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[13] This Court has stated that a treble damage plaintiff's burden of proof on the injury question is greater than that respecting the level of damages. Story Parchment Co. v. Patterson Co., 282 U.S. 555, 562 (1931). *See also* Flintkote Co. v. Lysfjord, 246 F.2d 368, 392 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957). The question of level of burden of proof is not central to the present case, where petitioners did not offer any proof of actual injury.

As described in our Statement, petitioners consciously declined to introduce evidence which bore on the question of injury to their outlet. No financial or profit-and-loss records were offered by them. No one familiar with petitioners' business testified as to any injury. No testimony from customers or potential customers was offered. Mr. Rea could not identify any lost sales. No evidence was presented to show that petitioners were driven out of business, lost profits or sales, incurred additional operating expenses, were forced to cut prices, or were otherwise in any way adversely affected by the acts of Ford. In an excess of caution, Ford as part of its defense introduced considerable evidence to show that petitioners were not injured. Petitioners offered no evidence in rebuttal.

Instead of presenting evidence of injury, petitioners proceeded on a theory which only serves to emphasize their failure of proof of any actual harm. Through use of a mathematical model presented by their expert witness, petitioners attempted to show that in theory Ford's interest would be served by purposefully operating company stores at a deficit in order to divert sales from competing manufacturers. All company-store deficits were described as "subsidies," and it was asserted that petitioners' outlet was, as a matter of law, automatically entitled to receive (trebled) a like "subsidy" per car from Ford. This theory of injury and damages bore no relation to actual injury. The competitive record of petitioners' outlet, its competitive viability, and its financial success were all irrelevant. Proof of lost sales, profits or any other injury in fact was unnecessary. And this theory leads to the peculiar result that the more successful a plaintiff was, the greater his right to damages.

The Petition now attempts to confuse the issue by statements calculated to create the impression that there is evidence in the record that the operations by Ford of its company stores had in fact inflicted injury upon petitioners' business. Petitioners state, for example, that their expert witness "related the effect" of company stores on independent dealers "such as [petitioners'] 22 Ford" and testified as to "the direct effect upon 22 Ford" of the alleged violation (pp. 24-25). But the cited record references contain no evidence whatsoever about actual injury to petitioners' business or property. They contain nothing more than the witness' exposition of his "subsidy" theory of automatic damages, along with an occasional comment that *if* his numerous hypotheses were accepted the operation of company-subsidized outlets might, or may, or would unintentionally divert some sales from franchised Ford dealers. But the witness did not purport to testify as to conditions which in fact existed in Pittsburgh, or that the operation of Triangle or any company outlet had in fact diverted any sales from independent Ford dealers as a group, or from any particular Ford dealer.

Most importantly, the witness did not purport to demonstrate that *petitioners'* outlet had been injured; he in fact admitted total ignorance as to the operations and business of that dealership. (*E.g.*, 3d Cir. App. 906a, 969a, 986a) Indeed, in the portion of the transcript cited by petitioners their expert stated:

> "I have never compared 22 Ford. To me, that is not a relevant argument. The relevant argument is what discount was provided to the factory outlets, and that has nothing to do with comparing it with 22 Ford. The only reason I have to assess

damages, I have to find out how much—how many cars 22 Ford sold." (3d Cir. App. 876a-77a)

Petitioners also make various references to other parts of the record which do not bear on the injury point. The fact of Ford's income tax deductions for deficit operations (p. 27) in no way bears on the question of whether petitioners suffered injuries. Nor is evidence that Triangle lost money in certain years (p. 20) evidence that petitioners lost money. Nor can petitioners' references to Ford's evidence on lack of injury (*e.g.*, the Forbes testimony referred to at page 23) be of assistance to them; that testimony demonstrated that petitioners had not in fact been injured (*e.g.*, 3d Cir. App. 1300a-05a), and petitioners failed to offer any rebuttal.

In most respects petitioners repeat *in haec verba* allegations of so-called evidence of "injury" made to and carefully considered by the court of appeals below. A number of these bear on alleged intent or supposed misconduct but in no respect on the fact of injury. In some instances the allegations are simply misleading. Hence, the petitioners' reference to the availability of the financial statements of "many competing dealers" (p. 25) is disingenuous insofar as it suggests to this Court that the jury may have compared petitioners' performance with that of more profitable independent dealers unaffected by the supposed misconduct. Those financial statements were of certain company stores and the thrust of petitioners' contentions as to these was that they were not profitable. Hence this evidence in no way bears on petitioners' supposed injury.

Further, the portions of the record now referenced by petitioners have no relation to the manner in which

this case was presented to the jury.[14] Petitioners below proceeded exclusively on the abstract and erroneous assumption that the antitrust laws obligated Ford to dole out gifts of capital to its 6,000 independently-financed dealers whenever a company-owned outlet was unsuccessful. This approach was reflected in a jury award of a large sum of "damages" where no injury had been proved. Petitioners deliberately refrained from presenting any actual evidence of injury or damage. This Court has noted that "[t]he production of weak evidence [in an antitrust case] when strong is available can only lead to the conclusion that the strong would have been adverse." *Interstate Circuit, Inc.* v. *United States,* 306 U.S. 208, 226 (1939). *Cf. Galloway* v. *United States,* 319 U.S. 372, 396 (1943).

Evidence of injury is required even where a plaintiff has made out the most egregious and inherently destructive antitrust violation. Here, by contrast, the challenged conduct was not predatory or destructive in any sense previously recognized by the courts. It was not claimed that Ford's company outlets sold cars at discounted prices or that Ford had imposed any competitive constraints on petitioners. Nor was it shown that franchised dealers were individually or as a group being caught in a price squeeze or driven from the marketplace. Essentially all that was proven was that Ford's Triangle outlet competed with its surrounding General Motors, Chrysler, and American Motors dealerships, in some years making a profit and in some years

[14] For example, petitioners refer (p. 25) to two isolated fleet sale arrangements and attempt to suggest these injured 22 Ford. But no effort was made at trial to demonstrate that 22 Ford was denied an opportunity to bid for this business or was in any way injured by these arrangements. Indeed, one of these sales was made *before* 22 Ford was in existence. (3d Cir. App. 190a, 643a)

not. To choose such a situation as the occasion for eviscerating the statutory requirement of some proof of injury as a prerequisite to suit would be bizarre. The court of appeals did not do so and instead correctly ruled, after a thorough consideration of the record, that petitioners had failed to make any showing that their business was harmed.[15]

Petitioners also attempt to argue that the injury question can be resolved by reference to the "target area" doctrine and that the court of appeals decision creates a conflict in this respect. (Pp. 28-31) This argument is frivolous. Roughly speaking, the target area doctrine corresponds to the proximate cause requirement in ordinary tort law. *E.g., Elyria-Lorain Broadcasting Co.* v. *Lorain Journal Co.*, 298 F.2d 356 (6th Cir. 1961); *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F.2d 358 (9th Cir. 1955). It is not a substitute for a showing of injury. On the contrary, it is a limiting doctrine, used to deny recovery to certain plaintiffs even though injured because their injuries were not sufficiently related to the alleged violation.

The determination in this case, however, was that no injury had been shown to exist. The question of the

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[15] The court of appeals ruled that as a matter of law no violation of Section 2 was made out, and this ruling has not been questioned by petitioners. No basis exists for holding that Section 1 of the Sherman Act is violated by operation of a factory-owned store with occasional losses and without predatory pricing, price-cutting, cost-price squeeze, or any other form of coercion of competing independent distributors. Therefore, the decision by the court of appeals is adequately supported on the alternative ground that no violation of the Sherman Act, as properly construed, was shown to exist. A second alternative ground which completely supports the judgment of the court of appeals is that no legally adequate computation of damages was offered.

directness or proximate cause of an injury did not even arise. There is no conflict between the circuits on the necessity of proving injury as a prerequisite to a Clayton Act suit. No court has held that a plaintiff has standing on the antitrust laws if he was "aimed at" by alleged conduct though not in fact "hit." [16]

III. There Are No Special Issues That Warrant Further Review

It is clear that the gist of petitioners' grievance is that it disagrees with the court of appeals' evaluation of the record below. Yet this was a case in which petitioners pursued the unique course of consciously declining to offer evidence that they were in fact injured by reason of the alleged violation. (The health of petitioners' business was "not relevant" and "we haven't put any evidence in the record to indicate any particular loss . . . ." (Pet. App. 120)) As indicated in the

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[16] In any event, the record in no way suggests that petitioners in particular were the "target" of Ford's company-store operations. The alleged statements by various Ford executives bearing on intent, even if accepted, refer generally to Ford dealers and can rationally be construed only as indicating a desire to compete effectively with other automobile manufacturers through company stores. (See Pet. App. 117, n.24) Petitioners' own expert on motive postulated that company stores were operated in order to obtain sales from competing manufacturers, and that any possible diversion of sales from independent Ford dealers would be unintended and non-beneficial to Ford. (*E.g.*, 3d Cir. App. 832a, 950a-51a) The *amicus* brief on appeal, filed by the Ford Dealers Allance, Inc., in support of petitioners, candidly concedes: "Actually it is highly improbable that it would ever be Ford's objective to put its retail dealers out of business." (P. 4) Indeed, the notion that petitioners might be the "target" of predatory conduct by Ford is belied by the fact that their new and desirable dealership was granted by Ford in 1964, three years after Triangle became company-owned and well after the alleged inception of the destructive conspiracy.

preceding section, the court of appeals correctly evaluated the record below. In any event, the question whether the court erred in this regard is not one that warrants this Court's attention, particularly given the *sui generis* nature of the proceedings here.

Nor is the case for review strengthened by petitioners' claim that the decision below will discourage private antitrust litigants (pp. 32-35). The court of appeals did nothing more than enforce the established rule that such a litigant must establish some injury to his business and property. The true effect of the appellate court's opinion, indeed, is probably the reverse of that forecast by petitioners. Nothing could serve more to discredit the treble damage remedy than massive awards to undamaged plaintiffs. Such discrediting would ultimately result either in Congressional counteraction or in distortion of the rules of substantive liability. The court of appeals has only reaffirmed that federal courts should be free to handle suits by truly aggrieved parties without being encumbered by claimants searching for undeserved rewards.

IV. No Substantial or Meritorious Claim Is Made Under the Automobile Dealers Act

An appellate court is not precluded from remanding a cause for a new trial on damages where the record is clear that the awarded sum was excessive and duplicative. *See, e.g., Gustafson* v. *General Motors Acceptance Corp.*, 470 F.2d 1057 (8th Cir. 1973); *Albrecht* v. *Herald Co.*, 452 F.2d 124 (8th Cir. 1971), *mandamus denied*, 405 U.S. 1063 (1972). If petitioners are contending merely that the appellate court in this case misconstrued the record as to the duplicative character of the awarded sum, such an issue is hardly worthy

of further review. In any event, given the record below, as reviewed in our Statement, the appellate court's action here was fully warranted. Moreover, the court of appeals correctly observed (Pet. App. 114) that the district court's charge on damages for the claim under the Automobile Dealers Act was defective in not alerting the jury to the danger of duplicative recovery. Where "the error in the charge could not but mislead the jury in reference to a material element necessary for its consideration in determining the amounts of the awards," a new trial is necessary. *United States* v. *River Rouge Improvement Co.*, 269 U.S. 411, 421 (1926). Petitioners will have a full opportunity below to prove any deserved damages.

V. Petitioners' Alternative Motion for Leave To File a Petition for a Writ of Mandamus Should Be Denied

Issuance of a writ of mandamus by this Court is an extraordinary act reserved for cases of "public importance and exceptional character." *Ex parte Republic of Peru*, 318 U.S. 578, 586 (1943). *See also Ex parte Fahey*, 332 U.S. 258 (1947); Rule 30, Rules of the Supreme Court of the United States (issuance of the writ "is not a matter of right but of sound discretion sparingly exercised"). It is used to confine a court to lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). It is not intended to serve as a device to secure reversal of a decision made in the exercise of a lawful jurisdiction, particularly where the decision may be reviewed in regular course. *Ex parte Slater*, 246 U.S. 128, 134 (1918).

The fact that the court of appeals has authority to act is discussed at pp. 14-17, *supra;* and the fact that

petitioners' Petition for Mandamus is virtually identical to their Petition for a Writ of Certiorari is itself a conclusve showing that the Motion is superfluous and should be denicd. Further, as demonstrated in our previous arguments, petitioners have no just complaint with the action of the court below.

CONCLUSION

The petition in this case raises only a question as to the content of the record below. The court of appeals correctly ruled that petitioners failed to present minimally adequate evidence that operation by Ford of a retail outlet had injured petitioners' franchised Ford outlet in any way.

Petitioners tried this case on the theory that any losses by the Ford-owned outlet constituted a discriminatory "subsidy" and an automatic "injury" to their outlet. They did not attempt to prove that the alleged violation resulted in any lost profits, caused the diversion of any sales, required an increase in expenditures, or otherwise adversely affected their business. While petitioner Rea speculated that his records or employees might be able to demonstrate lost sales, he could not identify even one lost sale and neither the records nor employees were brought forth at trial. Ford's detailed and substantial evidence that petitioners had not in fact been injured went uncontroverted. In light of the record, the appellate court correctly exercised its well-recognized review function, and did not unconstitutionally invade the province of the jury.

Petitioners argue in essence that the court of appeals has misread the record. That argument is incorrect but in any event presents no issue of importance warrant-

ing further review, particularly in view of petitioners' approach to the concept of injury taken at trial.

Petitioners' claim respecting the appellate court's remand of the damage question for the Automobile Dealers Act claim likewise raises simply a dispute as to the content of the record. And the appellate court's unchallenged ruling on the inadequacy of the damage instructions obviously necessitates a new trial.

Petitioners' request for a writ of mandamus is without substance. This case does not present an issue of public importance; the lower court acted within its jurisdiction; and the mandamus request is duplicative of the certiorari petition.

The petition for certiorari and the motion for leave to file a petition for writ of mandamus should be denied.

Respectfully submitted,

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